AZMAN JAMHURI

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CRIMINAL APPEAL NO: 42-09-2000-III(I)]
5 JANUARY 2001
[2001] CLJ JT(3)

CRIMINAL PROCEDURE: *Judgment - Grounds of decision - Delay by sessions judge in writing - Appeal before High Court - Prejudice to accused already serving sentence - Consequences*

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against - Grounds of decision - Delay in writing - Prejudice to accused - Whether appellate court should adjourn case to wait for grounds - Whether to proceed by revision*

CRIMINAL PROCEDURE: *Revision - Judgment, grounds of, unavailable - Delay in writing - Appeal before court - Whether conviction safe - Whether accused would be prejudiced by a retrial - Whether conviction should be set aside*

The accused appealed against his conviction and sentence by the sessions judge on two charges of possession of cannabis. The appeal record, however, did not contain a copy of the grounds of decision as required under s. 308 of the Criminal Procedure Code ('CPC'). The deputy public prosecutor urged the court to adjourn the instant appeal to enable the sessions judge to write his grounds of decision or, alternatively, to deal with the matter on revision.

Held:

[1] The sessions judge has yet to write his grounds of decision for another 44 criminal cases which appeals are still pending. As the present case went back more than two years ago, it would be impossible for the sessions judge to remember what the witnesses looked like or their demeanour unless there were some records of these being made. There were none here. Therefore, the case should not be adjourned as experience showed that such grounds of decision would not be forthcoming, and even if they came, they would not be of much use.

[2] The Chief Judge had in 1994 issued to all magistrates and judges a directive that grounds of decision must be given within six weeks of a ruling. A delay in supplying the grounds of decision can prejudice an accused or appellant.

[3] Delay is more critical in a criminal case than in a civil case as it involves the liberty of the subject. Criminal cases should take far lesser time than civil cases because they are unlikely to involve novel questions of law unlike in civil cases. The delay in supplying the grounds of decision in the present case was totally unacceptable.

[4] Since there were no grounds of decision and s. 308 of the Criminal Procedure Code was not complied with, the present case should be dealt with by way of revision and not by way of an appeal.

[5] The defence was disbelieved in both the charges. However, no reasons were given. The few statements of the sessions judge made in his ruling did not make for a "speaking judgment" and there were no grounds of decision. The conviction was, therefore, unsafe.

[6] The accused had already been incarcerated since 29 June 1998 and a retrial would mean that the accused would have to be further incarcerated for an indefinite period. That would be unfair to the accused and should serve as a reminder to those exercising judicial functions on the importance of not delaying justice and the consequences of such delay.

[Conviction and sentence set aside; no retrial ordered.]

Case(s) referred to:
Bishopgate Investment Management Ltd v. Maxwell [1993] BBC 120 ***(refd)***
Goose v. Wilson Sandford & Co [1998] TLR 86 ***(refd)***
Jaafar Abu & Anor v. PP [1988] 1 CLJ 595 ***(refd)***
K Ratnasingam v. Kow Ah Dek & Anor [1983] 2 CLJ 183 ***(refd)***
Mohammad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***
Ng Peng Hong v. Ng Shaw Ching & Anor [2000] 6 MLJ 403 ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242 ***(refd)***
Rolled Steel Ltd v. British Steel Corpn [1986] Ch 246 ***(refd)***
Tan Hun Wah v. PP [1994] 2 CLJ 180 ***(refd)***
TN Nathan v. PP [1978] 1 MLJ 134 ***(refd)***
Voon Chin Fatt v. PP [1948-49] MLJ Supp 131 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, s. 308

For the appellant - Charles Kanavathi
For the respondent - Marutin Pagan

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

Introduction

On 18 November 1998 Azman bin Jamhuri ("the accused") was convicted by the judge of Kuching Sessions Court 1 of two charges of possession of cannabis and was sentenced respectively to ten years imprisonment and ten strokes of whipping and one year of imprisonment. The accused has since been serving his sentence. The trial was staggered over a period of four months. The notice of appeal was filed on 27 November and thereafter the docket of this case was kept by the Sessions Court judge for the purpose of writing his grounds of decision. Everyone waited and when the appeal record was finally complied and forwarded to the High Court on 7 November 2000, it did not contain the grounds of decision. This officer has since 1 December 2000 been seconded elsewhere. In the end we are left with the few lines of his ruling that was made on 18 November which I will refer to later.

Mr. Marutin Pagan, the learned deputy public prosecutor, has urged the court to adjourn the case to enable the judge to write his grounds of decision or alternatively to deal with the matter on revision.

Adjourning To Allow The Grounds Of Decision To Be Written

Normally I would be inclined to adjourn the matter to allow the grounds of decision to be written since the appeal cannot be said to be properly before the court as the grounds of decision is not included in the record of appeal. And normally too, it should not be a problem for the judge to give his grounds. What militates against this course is not only the fact that the judge had been seconded away but more importantly, this judge has yet to write his grounds of decisions in another 44 criminal cases (of Kuching and Sri Aman). These appeals have been pending, 5 since 1992, 2 since 1993, 11 since 1994, 8 since 1995, 3 since 1996, 8 since 1997, 6 since 1998 and 1 since October 2000.

I must say that the continuing delay in the delivery of the grounds of decision in those cases show a highly regrettable and sorrowful state of affair. It is inconceivable how the judge would be able to cope and to remember for the purpose of deciding whom to believe the demeanour of witnesses who had given evidence as far back as eight years ago. Though the present case goes back more than two years it would nevertheless be as difficult as the case of eight years ago as this judge had also dealt with many witnesses in other cases of that year and which are also awaiting his grounds of decision. If you add the other witnesses in the other cases to the present case then it is impossible

to remember what the witnesses look like nor their demeanour unless there is some record of it being made but there is none in the present case. I therefore see no point in waiting for this judge to write his grounds of decision as my experience shows it will not be forthcoming and even if he does it will, for the reason I have said, be of not much use. It is a terrible tragedy that the judge could have continued for so long in the manner he had in trying cases.

Though a High Court has a general supervisory and revisionary jurisdiction over all subordinate courts under s. 35 of the Courts of Judicature Act 1964, it is easier said than done particularly when a High Court judge's service at a particular High Court is of a relatively short period with the result that before a problem, like this judge, can be effectively dealt with by a particular High Court judge, he is transferred away. In fact, given the present practice a High Court judge has no say in the assignment of the works of the Sessions Court judges and magistrates nor can he stop them from continuing with the hearing of cases when they have not delivered their grounds of decision in other cases. Apart from that the senior Kuching High Court judge has to supervise 2 Sessions Court judges and five magistrates not to mention his own High Court work. That is the reason how I come to inherit this problem that started eight years ago; that is in so far as the Kuching Courts are concerned and I do not know whether this judge was also a problem in the courts of other places.

I must say I had my hands full with this judge as I had to deal with 40 civil appeals against his decisions which were waiting for his grounds of decision and which I resolved by proceeding (with the agreement of the parties) with most of them without the grounds of decision. The parties were thoroughly fed up with the court with waiting and wanted to get over the matters as soon as possible. Again the parties had been waiting for the grounds of decision from as far back as 1992 (see *Ng Peng Hong v. Ng Shaw Ching & Anor.* [2000] 6 MLJ 403). After having solved the problem of those civil cases, the latest statistic I have concerning this judge now show he has again fallen into arrears in his grounds of decision in six cases, with some going back to 1999.

The picture looks even grimmer when you take into account the fact that the then Chief Judge had in 1994 issued to all magistrates and judges a directive that the grounds of decision must be given within six weeks of a ruling which apparently had been ignored. If the directive does not jolt him then surely the case of *Tan Hun Wah v. PP* [1994] 2 CLJ 180 should have because the Supreme Court there, *inter alia,* says that a delay in supplying the grounds of decision could prejudice an accused/appellant. The Supreme Court also said that trials should be carried out from day to day until its conclusion which unfortunately is also not followed not only in this case but also, as can be gathered from newspaper reports, in other criminal cases heard elsewhere in Malaya. What is undesirable for criminal trials is also true of civil trials

because the Privy Council had in *K. Ratnasingam v. Kow Ah Dek & Anor.* [1983] 2 CLJ 183 said that delayed and broken trials are substantial obstacles in the way of justice. I circulated this decision with a note to all the judges and magistrates in the Subordinate Courts when I assumed office in Kuching in November 1997. It seems to me that all except this judge hearkened to what was said in that case.

Delay of this nature is also not tolerated in England. The 14 February 1998 issue of both The Telegraph and The Times, Internet edition, carried the report of a senior judge in England, Mr. Justice Harman, being castigated for taking 20 months to deliver a judgment in a civil case. Though a ruling in the present case was given but the grounds of the decision were not given with the result that the High Court cannot deal with the appeal. It is even worse than the situation in the English case since at least they have the grounds of decision albeit 20 months late. In this case we have no grounds of decision at all though required of the judge by s. 308 of the Criminal Procedure Code. The English Court of Appeal ordered a retrial in that case and said (*Goose v. Wilson Sandford & Co.* [1998] TLR 86):

> The judge's tardiness in completing his judicial task denied justice to the winning party during the period of delay. It also undermined the loser's confidence in the correctness of the decision when it was eventually delivered.
>
> Compelling parties to await judgment for an indefinitely extended period prolonged, and probably increased, the stress and anxiety inevitably caused by litigation, and weakened public confidence in the whole judicial process.
>
> Left unchecked, it would be ultimately subversive of the rule of law. A situation like this must never occur again.

I find those statements appropriate for the present case. It is no less applicable though it is a civil case because delay is even more relevant in a criminal case as it involves the liberty of a subject. Criminal cases should take far lesser time than a civil case because it is unlikely to involve novel questions of law unlike civil cases. The English judge resigned thereafter. The English Court of Appeal had also previously censured judges for delay in delivering reserved judgment though the delay was only eight months (*Rolled Steel Ltd v. British Steel Corporation* [1986] Ch 246) and five months (*Bishopgate Investment Management Ltd v. Maxwell* [1993] BBC 120). If 20 months is intolerable, how can 24 months (and continuing) without any grounds of decision be tolerable? It must be remembered that justice delayed is justice denied. Why should the Malaysian standard be so much lower than that of the British? In fact the Malaysian standard was more or less set when the Chief Judge in 1994 (following a directive of the Chief Justice) set the said time limit of 6 weeks. It was obviously ignored. One has to go further back to see what the

standard is for criminal cases. In *Voon Chin Fatt v. Public Prosecutor* [1948-49] MLJ. Supp. 131, at 133, Spenser Wilkinson J said:

> The interval between notice of appeal and delivery of grounds of decision should, in such a case be a matter of days, not weeks, much less months. Indeed there is a very good reason from the Magistrate's point of view why grounds of decision should always be written as promptly as possible. The sooner, after hearing the witnesses the grounds of decision are written the clearer in the mind of the Magistrate who writes them will be all the details of the evidence, the demeanour of the witnesses and the general atmosphere of the case. Where delay occurs, not only have important details faded from the mind of the Magistrate who tried the case, but also additional work is involved as the whole case has to be studied afresh in order to bring the matter back to mind. In my opinion, the fact that no time limit is laid down by law for giving grounds of decision increases the responsibility of Judges and Magistrates to see that no undue delay occurs and that the spirit of the law rather than its letter is complied with.

The sentiment is echoed in the case of *TN Nathan v. Public Prosecutor* [1978] 1 MLJ 134, at 136, where Gunn Chit Tuan J (as he then was) said:

> In the present case, I regret to note that a summary trial under the provisions of the Criminal Procedure Code had to take so long to complete and that the judgment was not signed until eleven months after conclusion of the trial. Moreover, the further delay of another two years before receiving the grounds of decision was most unsatisfactory and has prejudiced the appellant.

While still on the subject of delay, it ought to be noted that Edgar Joseph Jr., J (as he then was) in the unreported case of *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ 1242, in respect of delay in the hearing of a case, held:

> ... that Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right, then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. the State (ibid)*, he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

Given those authorities, the delay in this case is totally unacceptable. Unpleasant and painful it is but I must in the interest of the administration of justice, say that this judge has caused a failure of both the civil and criminal justice system.

What remains to be dealt with is whether the present case is an appeal properly before this court. Now, s. 308 of the Criminal Procedure Code requires the "appeal record" to be sent to the High Court and it should consist of: (1) a copy of the record of proceedings, (2) a copy of the grounds of decision, (3)

a copy of the notice of appeal and (4) a copy of the petition of appeal. The grounds of decision is not with the record of the appeal and therefore s. 308 has not been satisfied. Therefore, this appeal could not be regarded as a proper appeal and the "appeal record" should be sent back to the Sessions Court for the judge to give his grounds of decision and thereafter to transmit the same to the High Court but, for the reasons I have stated above, it would be a pointless exercise. But the Supreme Court in *Jaafar bin Abu & Anor v. PP* [1988] 1 CLJ 595 was of the view that "there is no reason why an appellate court cannot hear an appeal without the benefit of grounds of judgment". In that case, involving a conviction for a corruption offence and where the grounds of judgment was not available because the officer had left the service, two questions of law were referred to the Supreme Court for a decision, *viz*.:

(a) When there is an appeal pending and no grounds of judgment are available, can the High Court act in revision? and

(b) If the answer is yes, what is the proper order the learned judge should make.

The court answered the first question in the affirmative and as regard the second, the court said that the High Court judge is entitled to make such order as he deems fit in the circumstances. In that case the High Court judge acted by view of revision to uphold the conviction. It will be noticed that the question of whether the High Court can hear an appeal without the grounds of judgment was never referred to the Supreme Court for a decision and therefore what the Supreme Court said there must be regarded as having been said in *obiter*. In my view, it does not really matter whether you act as if the case is under appeal or in revision; it calls for the same consideration which I will refer to later. I prefer to deal with the present case in revision since there are no grounds of decision and s. 308 had not been complied with.

Revision

It must be borne in mind that at this stage of the proceedings I cannot make any finding of facts. Therefore much will depend on what crucial findings had been made by the judge.

The prosecution case is that on 29 June 1998 at 12.05 noon a postman delivered a parcel to the accused just outside the house which the accused had rented and after checking his identity card. The accused acknowledged receipt. It was put to the postman that it was another person who was there at that time who had acknowledged receipt. This person was Razali bin Yusof ("Razali") who had gone to the accused's house to collect a helmet and as he was going out of the gate a postman had asked for the accused by name and he had told him that the accused was inside the house and he thereafter

left. Razali denied that he had taken the parcel from the accused after he allegedly claimed that the parcel was intended for him. Razali was also arrested on the same day as the accused and detained for eight days.

Chief Inspector Jack Joni ("officer Jack") had on that day received a phone call at 10.30am from an unknown person to inform him that there would be "drug activity" at the accused's house, giving him the exact address. A party of police officers then went to the area near the house, reaching the place at about 12 noon and then waited. Officer Jack witnessed Razali leaving the house and the handing of the parcel from the postman to the accused. The police party waited until the accused re-emerged from the house and was about to go away on a motorcycle when they stopped the accused. The accused then led the party back to the house and he was given the statutory caution about making statements which the judge found to be voluntary after a trial within a trial. The accused led the police party to a store room where a newspaper wrapped package was found and it contained dried leaves. The accused then led the party to another area of the house to recover a black plastic bag containing 32 packets of dried leaves and the parcel, also described as an envelope, which the postman had handed to the accused and it was found to contain compacted dried leaves. The recovery was made without the police having to conduct any search. All the cannabis were established to be cannabis. The accused had told officer Jack that the dried leaves were "Ganja", the Malay word for cannabis. Also admitted was a cautioned statement of the accused taken in the office of the police anti-narcotic branch. In this statement the accused confessed to showing the police the envelope and mentioning it to contain cannabis. He said he bought it from a certain person in Negeri Sembilan at RM500 and had done so twice, the second occasion of which was the time the postman delivered it to him.

The accused in his defence said that he handed the envelope to Razali after it was obtained from the postman. When he was about to leave on his motorcycle after taking a bath, the police party stopped him and brought him back to the house where they searched the various parts of the house. He said that it was the police who recovered the cannabis. He said Razali and others would use one of the rooms and the sitting room of the house and that a key to the house was left at the letterbox for them. Witnesses were called to testify to the messy state of the house which they visited on 10 July 1998 and as to how the key to the house can be retrieved from the letterbox.

After the closing speeches were made on 4 November 1998, the judge on 18 November 1998 made the following ruling:

Considered in the light of the prosecution's evidence, in particular, the evidence of the police witnesses and the cautioned statement recorded from the accused mere hours after his arrest, in which he had made an unqualified admission to possession of the drug cannabis particularly the item received by Pos Laju and which statement I find to have been made voluntarily without any threat, promise or inducement from any person in authority, I find that the defence story that the said items belonged to the accused's friend or that the drug could have been placed where they were found by some others who could have gained access to the accused's rented house, cannot reasonably nor probably be true. I reject the defence story as being untrue.

I find the defence has not cast any reasonable doubt on the prosecution's case.

I find it proved beyond any reasonable doubt that the accused was in possession of the items of drugs stated in the two charges and I therefore found the accused guilty on both the 1st and 2nd charges as amended.

I therefore convict the accused on the two amended charges.

So, in relation to the first charge, it is crucial to determine whether the parcel or envelope was in fact handed to Razali by the accused after the accused had received the same from the postman. The parcel remained unopened until after its recovery. Razali had denied it. Add to that we have the cautioned statements that tend to show the accused had received the envelope, that the accused had shown the police where it was kept and that the accused had mentioned that it contained cannabis. Notwithstanding that, the accused's allegation that the envelope was handed to Razali must be considered and so also whether it cast any doubt on the truth of the admissions made by the accused as contained in those statements which he denied having made. In this regard the judge had said in his ruling above that the defence cannot "reasonably nor probably be true" and he rejected the defence story as being untrue when compared to the evidence of the prosecution. That surely is not a sufficient consideration of the defence. In *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073 the Supreme Court had held that: "Even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case." Now the defence had said that a key was always left at the letterbox, which Razali also admitted, to enable a number of people to gain access to the house. The prosecution evidence had shown the recovery of a black plastic bag apart from the envelope and there is no evidence as to how it gets there. The police party had said that there was no need to search the house as the accused led them to the discovery of the cannabis and yet the defence had led evidence that the house was somewhat messed up supporting the allegation of the accused that the police party had searched various parts of the house and that they

found the cannabis instead of the accused showing them where they were. If that is the case, would not that cast a reasonable doubt on the allegation of the police that they did not have to search? There is evidence that people including Razali can gain access to the house by using the key left at the letterbox which gives rise to the possibility of other people having access to the house and placing the cannabis where they were found. All these evidence of the defence the judge must consider and say how they do not cast any reasonable doubt on the case of the prosecution. If the judge accepts, this means making a finding, that the house was in a mess as a result of a search by the police party then it would mean that the police witnesses could have been lying and that in turn would lead the judge to consider whether there is any doubt as to the truth of the caution statements. It was opened to the judge to reject those evidence of the defence but with sufficient reason. Unfortunately, though the defence was disbelieved, no reasons were given. Those few statements of the judge, above, which he made in his ruling do not make for a "speaking judgment" and there are no grounds of decision.

As for the second charge, there is no evidence led as to how that black plastic bag came to be in the part of the house where it was found. Since the house can be accessed by so many people, possession by the accused must be established and there is no evidence of that. In view of the accused's denial of any knowledge of it, the judge will have to say why he did not believe the accused and why the defence has not created any reasonable doubt on the case of the prosecution. This has not been done.

In the end I am left with the conclusion that the conviction is not safe. Mr. Charles Kanavathi, learned counsel for the accused, had argued that there should not be a retrial for the reason that the accused had already been incarcerated since 29 June 1998 and an order for retrial would mean that the accused would have to be remanded and therefore further incarcerated for an indefinite period while waiting for the trial which would be unfair to the accused. I find force in that argument which I accept. Let this be a reminder to us exercising judicial function as to the importance of not delaying justice and the consequence that will result if there is such delay.

Conclusion

In the premises and in exercise of my power of revision, the conviction and sentence is set aside.